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The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I write to relate my experience as counsel for a class of over 3,000 employees in *Wade Jensen, et al. v. Solvay America*, 721 F.3d 1180 (10th Cir. 2013), with Judge Neil Gorsuch changing the facts in our case on appeal in order to reach a policy result he preferred.

The glaring error in Judge Gorsuch's decision in *Jensen* was that it held the ERISA notice violation that a different panel found in 2010 (*see* 625 F.3d 641 (10th Cir.) was "accidental, no more than an oversight in the process of drafting a complex statutorily mandated notice." 721 F.3d at 1183. The passage where Judge Gorsuch stated that the violation was "accidental" and "no more than an oversight" was not accompanied by any citation to the record below. In fact, after a six-day bench trial, the District Court in Wyoming had found that the employees had "carried their burden" of proving the notice violation was "intentional" if a "general intent" standard applied, but not if specific intent was required. JA at 37-38 (in Case No. 11-8092).

Although the decision was unanimous, Judge Gorsuch had a unique familiarity with the case, having been the only member of the three-judge panel to hear the previous appeal. It is a basic tenet of appellate judging that the judge must accept the facts found below, and not alter them or reshape them by "its own interpretation of testimony." *Anderson v. Bessemer City,* 470 U.S. 564, 577 (1985); *accord, Brammer-Hoelter v. Twin Peaks Charter Acad*., 602 F.3d 1175, 1180 (10th Cir. 2010). This is not something that I am just now expressing. We filed a petition for rehearing and rehearing en banc and a petition for certiorari in *Jensen* on this same basis.

As a result of recent listserv postings I have now found other lawyers who have had the same experiences with Judge Gorsuch. In another ERISA case involving disability benefits,

McClenahan v. Metropolitan Life Ins., 416 Fed. Appx. 693 (10th Cir. 2011), Judge Gorsuch found "no evidence of radiculopathies [conditions due to a compressed nerve in the spine that can cause pain, numbness, tingling, or weakness] present on or after" a certain date, even though there was a positive test four days earlier and radiculopathies do not disappear in that time span. A third employment lawyer who is reluctant to come forward relates how Judge Gorsuch rewrote the facts in order to affirm summary judgment against employees. As in the *Jensen* case, Judge Gorsuch was pleasant and polite during oral argument, and wrote the opinions in a folksy, story-telling way without citations, which obscured that the decision had altered the facts in the cases.

Citing the *Jensen* decision, the *Trans Am Trucking* case, and *Hwang v. Kansas State* by name, a 2/25/2017 article by the Associate Press' National Investigative Team found that Judge Gorsuch "has sided with employers 21 out of 23 times in disputes over the U.S. pensions and benefits law, the Employee Retirement Income Security Act, or ERISA." http://bigstory.ap.org/article/9ae590166f114d9b9907ea4e3c75d04b/gorsuch-often-sided-employers-workers-rights-cases

It was only in the two months since Judge Gorsuch's nomination that I learned he had strong philosophical objections to a general intent standard. By finding that the violation was "accidental, no more than an oversight." Judge Gorsuch ruled for the company and against the employee class while avoiding a direct legal ruling that a specific intent standard applied. In September 2011, Judge Gorsuch gave a talk on "Intention and the Allocation of Risk" that was made into a chapter for John Keown and Robert P. George, eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (2013). In line with the natural law philosophy of Professor Finnis, his mentor and dissertation advisor at Oxford, Judge Gorsuch's talk and chapter offer a powerful attack against liability based on general intent standards (which he believes are epitomized by the utilitarian views of Judge Richard Posner in the Seventh Circuit). Here are extended quotes from Judge Gorsuch's chapter (at 413, 419-20):

> "[T]here are still other normative justifications for the special emphasis the law places on intentional conduct. One has to do with human equality. When someone intends to harm another person, Finnis encourages us to remember, "[t]he reality and fulfillment of those others is radically subjected to one's own reality and fulfilment, or to the reality and fulfilment of some other group of persons. In intending harm, one precisely makes their loss one's gain, or the gain of some others; one to that extent uses them up, treats them as material, as a resource." People, no less than material, become means to another's end. To analyze *Bird v. Holbrook* as the challengers [like Judge Posner] to extant law would have us, we ask merely whether superior collective social consequences are produced by ruling for the plaintiff or defendant. On this account, there is nothing particularly special about the individual. Like any other input or good, it gives way whenever some competing and ostensibly more important collective social good is at stake. But it is exactly to prevent all this that the law has traditionally held, in both crime and tort, that one generally ought not choose or intend to harm another person,

and that failing to observe this rule is a particularly grave wrong. This traditional rule "expresses and preserves each individual person's…dignity…as an equal." It recognizes that "to choose harm is the paradigmatic wrong; the exemplary instance of denial of right." It stands as a bulwark against those who would allow the human individual to become nothing more than another commodity to be used up in aid of another's (or others') ends.

Not only does Finnis help us to see that the traditional intent-knowledge distinction in law bears analytical power overlooked by its critics. He also helps expose the undergirding normative reasons for the law's traditional cognizance of intention. He reminds us, for example, that some of the law's harshest punishments are often (and have long been) reserved for intentional wrongs precisely because to intend something is to endorse it as a matter of free will--and freely choosing something matters. Our intentional choices reflect and shape our character--who we are and who we wish to be--in a way that unintended or accidental consequences cannot. Our intentional choices define us. They last, remain as part of one's will, one's orientation toward the world. They differ qualitatively from consequences that happen accidentally, unintentionally....

This is a view, of course, that has long and deeply resonated through American and British jurisprudence, and indeed the Western tradition. It is precisely why the law treats the spring gun owner who maims or kills intentionally so differently from the negligent driver whose conduct yields the same result. As Roscoe Pound once put it, our "substantive criminal law is," at least at minimum, "based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong."

Employees who have been the victims of violations of labor standard violations in the workplace, including disclosure violations related to their health and retirement benefits, deserve to have their claims decided by appellate judges who are committed to enforcing the laws Congress has enacted based on the factual records developed in the trial court. Judge Gorsuch's actions in changing the facts in employment cases on appeal represent an appalling elevation of the interest of companies and his own philosophical interests over the laws Congress has enacted and the rights of employees to earn a living, including decent benefits and retirement income.

I respectfully ask that this letter be made part of the Judiciary Committee's record.

Sincerely,

Stephen R. Bruce